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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-5015

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SUPREME COURT, U.S.

RICHARD WOOD

Petitioner

vs.

STATE OF OHIO

Respondent

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*Petro*

REPLY BRIEF

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Responding to the State's opposition to the issues raised by our petition, the point should be made here that this Court's decision in United States v. Hale, \_\_\_ U.S. \_\_\_ (6/23/75), has not altered their stance. Thus, the State's counsel still cites, as compelling here, certain cases that were expressly rejected by this Court in Hale.

Here reference is being made to the following express language, from the Brief of Respondent, whereby he "commends to this Court" as well reasoned and persuasive authority, the decisions of "United States ex rel Burt v. New Jersey, 475 F 2d 234 (3d Cir. 1973); United States v. LaValle, 471 F 2d 123 (2d Cir. 1972); United States v. Ramirez, 441 F 2d 950 (5th Cir. 1971) cert. den., 404 U.S. 869; United States v. Russell, 332 F Supp 41 (E.D.Pa. 1971); Johnson v. People, 473 F 2d 974 (Colo.1970)." (Brief of Respondent, p. 5).

1

In taking the above position, Respondent's counsel was either oblivious to the fact that this Court flatly rejected the logic of this position after having considered some of the very cases relied on in the State's Brief.

Here reference is being made to the cases of Burt, supra, and Ramirez, supra. Thus, it could not be clearer, the State's espousal of the anachronistic notion as expressed in the following segment of the Opinion by the Court of Appeals, simply cannot be validated. Here the Court of Appeals stated:

"After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R 504-508).

This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness." (See Appendix, Petition for Certiorari, p. 64.)

As to all this, it may suffice simply to say that this ruling by the Court of Appeals is diametrically opposed to the position taken by this Court in Hale.

Thus we contend that, for this reason alone, the grant of certiorari in this case should be assured. On the other hand, our case is much stronger than Hale. For, here, the trial court not only overruled our objections to these constitutionally impermissible questions, the Court affirmatively permitted counsel for the State to not only fully exploit this line of questioning, but to argue the resultant inferences,

and other related points to the jury. Here we have reference to the following additional questions based on why petitioner did not reveal his version of the facts at the preliminary hearing, and why he refused to consent to the search of the car, which required the police to obtain a search warrant. Here the record shows counsel for the State was authorized by the Court to make the following argument:

"But ladies and gentlemen, there is one statement I am going to make. If you are innocent, if you are innocent, if you have been framed, if you have been set up as claimed in this case, when do you tell it? When do you tell the policemen that?

BY MR. WILLIS:           Objection.

BY THE COURT:           He may ask the question. It is something for the jury.

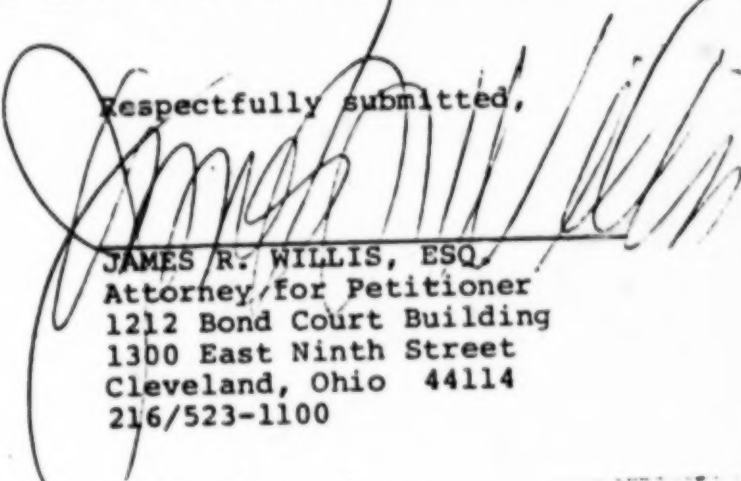
BY MR. CUNNINGHAM: Think about it. After months - after various proceedings and for the first time? I am not going to say any more about that but I want you to think about it. So once again, once again, please, when you consider this case, think about the facts in this case and don't be distracted by personalities, or attacks on me, Beamer, or anyone else. Think about the case. Think about it in its prospective." (See Appendix, Petition for Certiorari, pp. 90-91.)

The above comparisons with this Court's decision in Hale certainly demonstrate crucial flaws in this petitioner's conviction. On the other hand, perhaps an even greater flaw in this conviction is exposed from the fact that in Hale the trial Court had both sustained defense objections to the impermissible line of questioning and instructed the jury to disregard its implications; whereas, the trial Court here not only permitted the entire line of questioning to be exhausted but affirmatively allowed these points to be argued to the jury.

II

Also, the point must be made here that the penalty provision of the statute, under which Wood was sentenced to a term of 20-40 years for the sale of marijuana, has been declared unconstitutional by the Sixth Circuit Court of Appeals, in Downey v. Perini, \_\_\_ F 2d \_\_\_ (decided July 3, 1975, Case No. 74-1929). While a stay of execution has been granted the State in that cause, pending application in this Court for a writ of certiorari, the point must still be made here that should this Court sustain the Sixth Circuit's Downey decision then surely this is a further factor that should cause this Court to deal directly with this cause.

Respectfully submitted,

  
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